No. 14951

United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON, Appellant

v.

HUGH EARLE, Collector of Internal Revenue, WALTER S. SHANKS, IRWIN BORTHICK and IRVING H. CURRAN, Appellees

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEES

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STATUTES

MISCELLANEOUS

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OPINION BELOW

The findings of fact and conclusions of law (R. 38-42) and memorandum decisions of the District Court (Appendix B, *infra*) are not officially reported.

JURISDICTION

This appeal involves an action instituted in the United States District Court for the District of Oregon

for damages for the alleged unlawful conversion by a Collector and Deputy Collectors of Internal Revenue of certain property of the appellant. (R. 3-5.) The complaint was filed on July 2, 1954 (R. 44), and an amended complaint was filed on February 1, 1955 (R. 3-5). Appellant claims jurisdiction in the District Court under the provisions of 28 U.S.C., Sections 1331, 1340, and 1356. (Br. 2-3.) The District Court entered its judgment on June 21, 1955. (R. 43, 49.) Notice of appeal was filed on July 21, 1955. (R. 44.) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether appellees, a Collector and Deputy Collectors of Internal Revenue, may be held liable in damages for the alleged unlawful conversion of certain property of the appellant which he purchased from the taxpayer, but on which the Government had a prior lien for taxes assessed the taxpayer.

STATUTES INVOLVED

These are set forth in Appendix A, *infra*.

STATEMENT

Some of the facts were stipulated (R. 18-20) and were so found by the District Court (R. 38-42); they are as follows:

On September 7, 1945, the Commissioner assessed against taxpayer Earl L. Marshal, doing business as

Marshal Logging Company, Blue River, Oregon, federal withholding taxes for the second quarter of 1945, including penalty and interest, totalling $1,260. The Commissioner's assessment list (including the foregoing assessment) was received by the Collector of Internal Revenue of Oregon on September 19, 1945. On that date payment was demanded from taxpayer, but without avail. On October 17, 1945, the Collector issued a statutory warrant for distraint, commanding a levy and sale of all property or rights to property belonging to taxpayer Earl L. Marshal, or property on which a federal tax lien existed. Thereafter, on October 20, 1945, a notice of federal tax lien was filed in the office of the County Clerk for Lane County, Oregon. (R. 39, 40.)

Between October 26, 1945, and January 25, 1946, Earl L. Marshal was the owner of a certain caterpillar tractor more particularly described as "D-8 Caterpillar Tractor with Dozer and Winch Attachments," Serial No. 1H4589, subject to a chattel mortgage in favor of Lewis Neuman, which was assigned to Otto W. Heider after its execution. On January 25, 1946, Roy O. Stotts loaned $5,820 to Marshal to satisfy the Heider mortgage, and in return received a bill of sale to the caterpillar tractor which the Supreme Court of Oregon held[1] to be simply a chattel mortgage to secure repayment of the $5,820 plus a service charge, making the total secured indebtedness $6,000. (R. 41.)

On May 29, 1946, Marshal executed a bill of sale to appellant Johnston of all his right, title, and interest in

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[1]*Stotts v. Johnson and Marshall,* 192 Ore. 403, 234 P. 2d 1059, rehearing denied, 235 P. 2d 560 (Ore.).

and to the caterpiller tractor subject to a note held by Stotts for the following consideration: (1) $750 cash; (2) appellant's promissory note for $1,200; and (3) appellant's agreement to assume payment of the outstanding indebtedness to Stotts, at least in the amount of $4,100. (R. 41.)

In the early part of July 1948, appellant was in possession and control of the above-mentioned caterpillar tractor in Clackamas County, Oregon, and "on such date," appellees Borthick and Curran located the tractor in Clackamas County, took possession thereof pursuant to the warrant, and thereafter caused the tractor to be moved to Portland, Oregon. (R. 41-42.)

The record further discloses that on July 2, 1954, appellant filed a complaint in the District Court for the District of Oregon (R. 44), which he subsequently (February 1, 1955) amended (R. 45). It was alleged in the amended complaint (R. 3-4), stipulated (R. 18-19), and the District Court found (R. 39-40), that at all times material appellee Hugh Earle was the Collector of Internal Revenue for the District of Oregon, and, as such, a federal officer; that appellee Walter S. Shanks was the Chief Field Deputy in charge of Deputy Collectors of Internal Revenue for the District of Oregon, and, as such, a federal officer; and that appellees Irwin Borthick and Irving H. Curran were Deputy Collectors of Internal Revenue for the District of Oregon, and, as such, federal officers, acting under the direction of Shanks, who in turn acted under the direction of Earle. It was further alleged that, acting under a war-

rant of distraint directed generally against the property of taxpayer Earl Marshal, appellees Curran and Borthick did, on or about July 10, 1948,[2] "levy upon, seize and remove from the property and possession of plaintiff in Columbia County, Oregon, a certain caterpillar tractor, the property of plaintiff"; that the seizure was made "without cause or legal authority under the laws of the United States pertaining to seizure" and "under the pretense of the collection of a certain lien against one Earle Marshall" who at the time and place of the levy and seizure "had no interest in or to said tractor and defendants and each of them did thereby take and convert the same to their own use and purposes"; that "such action deprived plaintiff of the property without just compensation and without the process of law contrary to the Constitution of the United States"; that appellant had purchased the tractor from Earl Marshal without either actual or constructive notice of the existence of any lien against the property; that the seizure was made by appellees while acting as officers of the Internal Revenue Service "but without color of authority"; and that the value of the tractor at the time and place of levy and seizure was $15,000, for which sum appellant demanded judgment against the appellees. (R. 4-5.)

The District Court concluded (R. 42; Appendix B, *infra*) that appellees were each federal officers "acting within the scope of their authority in taking the tractor from plaintiff's possession," and entered judgment for appellees (R. 43).

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[2]Mistakenly stated to be "1945."

SUMMARY OF ARGUMENT

The sole issue herein is whether a Collector and Deputy Collectors of Internal Revenue may be held liable for damages for the alleged unlawful conversion of certain property (a caterpillar tractor) of appellant, where the acts of the officials in levying upon the property were performed entirely within the scope of the authority vested in them by law. Although the amended complaint alleges an unlawful conversion of the tractor, consequent upon an alleged unlawful seizure, the appellant has totally failed to prove his allegations.

The record discloses that taxes in satisfaction of which the property was seized were assessed against the taxpayer Marshal; that the assessment list, including those taxes, was received by the Collector then in office; and that a notice of federal tax lien was duly filed in the office of the clerk of the county "within which the property subject to such lien is situated" as prescribed by federal and state law. No question is raised as to the form or sufficiency of the assessment or the assessment list. It is clear, moreover, that property is "situated" in the county where the owner thereof resides.

Under the provisions of Sections 3670 and 3671 of the Internal Revenue Code of 1939, the lien of the Government herein arose on the date (September 19, 1945) the assessment list was received by the Collector, and attached to "all property and rights to property" of the taxpayer. Under the provisions of Section 3672 that lien

was valid as against a subsequent "purchaser," such as appellant herein, once notice thereof was filed (October 20, 1945) in the office of the Clerk of Lane County, Oregon, wherein taxpayer resided and the property in question "situated."

Shortly after the notice of lien was filed as prescribed, taxpayer acquired the property (tractor) in question, subject to a chattel mortgage. He remained the owner thereof until May 29, 1946, when he sold his right, title, and interest therein to appellant Johnston. Since the lien of the Government for taxes attaches to after-acquired property, it attached to taxpayer Marshal's property rights in the tractor at the time he acquired it and was in effect when the Deputy Collectors, acting under the direction of their lawful superiors and a valid warrant for distraint, seized and levied upon it. Thereafter, a chattel mortgagee, one Stotts, paid the amount of the delinquent taxes, and the tractor was released to the appellant and disposed of as described in another lawsuit, entitled *Stotts v. Johnston and Marshall.*

The receipt of the assessment list referred to above constituted the warrant of the Collector to distrain and levy upon the property in question and also constituted his authority to issue a warrant for distraint directing the Deputy Collectors to levy upon such property. The latter warrant was in all respects valid and appellant has not demonstrated otherwise. Even apart therefrom, the distraint and levy was made in relation to matters committed by law to the control and supervision of the Collector and Deputy Collectors.

Under the circumstances, there was in fact no illegal conversion of appellant's property. The Collector and Deputy Collectors acted within the scope of their authority and may not be held liable in damages.

ARGUMENT

The Evidence Clearly Establishes That the Acts of the Appellees Were in all Respects Lawful

Appellant seeks to recover damages from appellees, a Collector and Deputy Collectors of Internal Revenue, for the alleged unlawful conversion of a certain caterpillar tractor arising from the alleged unlawful seizure thereof from his "property and possession." (R. 3-5.)[3] The court below held (R. 42) that the appellees were each federal officers acting within the scope of their authority in taking the tractor from appellant's possession, and entered judgment (R. 43) in their favor. It appears to be appellant's position that the action of the Collector and Deputy Collectors was wrongful (1) because there was no valid lien on the property, and (2) the warrant for distraint was invalid. The evidence establishes the contrary.

A. The lien was valid

On September 7, 1945, the Commissioner assessed against taxpayer Earl L. Marshal, doing business as Marshal Logging Company, Blue River, Oregon, federal with-

[3]Basically, he is seeking to assert a right to the tractor as "purchaser" thereof superior to the lien of the Government for taxes assessed against taxpayer Marshal from whom he purchased the tractor.

holding taxes for the second quarter of 1945 in the total amount of $1,260. (R. 39.) The assessment list was received by the Collector's office on September 19, 1945, and on that date notice was given taxpayer and demand for payment made; taxpayer, however, neglected to pay any portion of the amount assessed. (R. 39.) Section 3670 of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides that, if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 of the Internal Revenue Code of 1939 (Appendix A, *infra*) further provides that unless another date is specifically fixed by law—

> the lien shall arise at the time the assessment list was received by the collector [in this case, September 19, 1945] and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Section 3672(a)(1) of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides that such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor, until notice thereof has been filed by the Collector:

> In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *

The Uniform Federal Tax Lien Registration Act of Oregon (Section 87.805 of 1 Oregon Revised Statutes (1953), Appendix A, *infra*) provides in material part that notices of liens for taxes payable to the United States shall be filed in the offices of county clerks for the county or counties of the state "within which the property subject to such lien is situated."

The notice of federal tax lien for the taxes here involved was filed in the office of the County Clerk for Lane County, Oregon, on October 20, 1945. (R. 39.) Appellant argues, however, but without citation of any record references, that the "evidence" proved the tractor was not in Lane County between the date of filing the notice of lien and the date of appellant Johnston's purchase of the tractor; he also states (citing the "Additional Memorandum" decision of the court dated June 17, 1955; Appendix B, *infra*) that the lower court properly held that the appellees made a " 'mistake' of fact" in believing that the tractor was in Lane County. (Br. 11.) The latter statement is incorrect for the court actually stated that it doubted the correctness of plaintiff's (appellant's) *assumption* on re-argument that the tractor was not in Lane County "between October 20, 1945, and May 29, 1946, the key dates."

Whether the tractor was or was not physically located in Lane County, Oregon, at the time of the seizure or alleged conversion is immaterial[4] for taxpayer was a resident of that county at the time the notice of lien

[4]It is noted that, at the trial of this case, the witness Shanks mistakenly assumed that it was material and controlling (R. 95.)

was filed. In *Investment & Securities Co. v. United States,* 140 F. 2d 894 (C.A. 9th),[5] a bank in the State of Washington owed money to a taxpayer whose residence was in Wisconsin. The Government's tax lien was filed with the Clerk of the District Court of Wisconsin and with the Register of Deeds of Outagamie County, Wisconsin, but not in Washington. This Court held (p. 896):

> The taxpayer here is a resident of Wisconsin and the notice of lien was duly recorded there. The appellant's contention that the recording should have been in the State of Washington rather than Wisconsin, the taxpayer's domicile, is in error.

To the same effect is *Grand Prairie State Bank v. United States,* 206 F. 2d 217 (C.A. 5th), which involved an action by the United States to enforce its income tax lien against certain diamond rings owned by taxpayer but in possession of the bank as a mortgagee and pledgee thereof as security for a loan. Notices of tax liens were filed in Tarrant County, Texas, the residence of the taxpayer. Thereafter, taxpayer obtained a loan from the bank doing business in Dallas County, Texas, pledged the rings as security therefor, and also executed a chattel mortgage covering the rings as evidence of the pledge. The trial court held that the liens of the United States, having been filed for record in the county of the taxpayer's residence prior to the date the bank acquired its lien against the rings, were superior to the bank's lien. On appeal the bank contended, *inter alia,* that, although

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[5]Affirming a decision of the District Court reported at 49 F. Supp. 620 (E.D. Wash.) See also *United States v. Kings County Iron Works,* 224 F. 2d 232, 237 (C.A. 2d).

the notices of liens were properly filed in Tarrant County, the domicile of the taxpayer, the failure of the Collector to file the notices for record in Dallas County prior to the time it acquired its claim against the rings operated to subordinate the liens of the United States to its liens. It was argued that because of the transitory nature of the property, and of personal property in general, notices of tax liens recorded in Tarrant County were ineffective to give constructive notice to a mortgagee or pledgee that acquired its claim against the property after it was removed from that county. Since the language of the Fifth Circuit's opinion affirming the judgment of the trial court is particularly appropriate and applicable to the situation herein, we quote therefrom as follows (p. 219):

> The statute, however, does not require a tax lien to be filed in every county to which personal property may be carried in order to be enforceable against a subsequent mortgagee or pledgee. The requirement that notice of lien be filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated is satisfied, so far as is pertinent here, when such notice is filed in the county of the taxpayer's domicile. * * * It is the transitory nature of personal property which requires the application of this rule. To hold otherwise, would be to overlook the practical necessities of the situation and would require the Collector to file tax liens in every jurisdiction to which the taxpayers may at any time remove the property. We no not think this result was intended by the statute, * * *

While the burden was on appellant to show that the residence of taxpayer was not in Lane County, Oregon,

at the time (October 20, 1945) the notice of lien was filed therein, we submit that the record affirmatively shows that his residence was in that county. Thus, Exhibit 28, which consists of several documents constituting records of taxpayer in the hands of his accountant (R. 53-54),[6] all of which show taxpayer's residence at and about the time in question to be at places in Lane County; they are as follows: (1) a letter from the Secretary of the State of Oregon, dated October 3, 1945, and addressed to taxpayer at the Gold Star Cottages, Eugene, Oregon; (2) a payroll audit of the Marshal Logging Company, operated by taxpayer, covering the period July 1, 1945, to October 11, 1945, listing his address at Eugene, Oregon; (3) a bill to taxpayer from the "Eugene Register Guard" dated October 25, 1945, and addressed to him at the Gold Star Cottages, Springfield, Oregon, for a want ad placed by him under date of October 20, 1945; the ad lists a Springfield telephone number; (4) a burning permit issued to taxpayer on October 25, 1945, listing his address at Vida, Oregon. In addition Defendant's Exhibits 9 and 10, being statements of financial condition executed by taxpayer on August 27, 1945, and November 1, 1945, respectively, list his address, respectively, at Vida and Eugene, Oregon. (R. 34.) Furthermore, taxpayer testified (R. 109) that to the best of his knowledge he lived at Vida, Oregon, on August 27, 1945, and at Eugene, Oregon, on October 20, 1945, and November 1, 1945. The addresses mentioned, namely, Eugene, Springfield, and Vida, are all places located in Lane

[6]Erroneously referred to therein as Defendant's Exhibit 19.

County, Oregon (Directory of Post Offices, United States Post Office Department).

Shortly after the notice of lien was filed, and between October 26, 1945, and January 25, 1946, taxpayer was the owner of the caterpillar tractor involved herein, subject to a chattel mortgage in favor of one Neuman, which had been assigned to one Heider. On January 25, 1946, one Stotts loaned taxpayer approximately $6,000 to satisfy the Heider mortgage, and in return received a bill of sale to the caterpillar tractor, which the Supreme Court of Oregon held in the case of *Stotts v. Johnston and Marshall,*[7] 192 Ore. 403, 234 P. 2d 1059, rehearing denied, 235 P. 2d 560, to be simply a chattel mortgage. After the Heider mortgage was satisfied, and on May 29, 1946, taxpayer executed a bill of sale to appellant of all his right, title, and interest in and to the tractor subject to the note (chattel mortgage) held by Stotts. (R. 41.)

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[7]In that case, Stotts brought suit against Johnston and Marshal (the appellant and taxpayer, respectively, herein) to foreclose a "bill of sale" covering the tractor which he alleged to be simply a chattel mortgage, and to recover the amount of the taxes involved in the instant appeal which Stotts had paid to the Collector of Internal Revenue in order to preserve his interest in the tractor which had been seized for tax sale. After institution of the suit, and by virtue of a stipulation signed by the parties (see R. 29-30), one Wonderly, who had purchased the tractor from Johnston, deposited the sum of $9,000 with the clerk of the county court as a substitute for the tractor. The Oregon Supreme Court stated (p. 1061) that the record in that case indicated that the deposited sum belonged, in fact, to Johnston. The county court entered a decree in favor of Stotts and against Marshal, directing payment of $6,000 (the amount of the chattel mortgage) and $1,320.71 (the amount of the delinquent taxes paid, including costs) out of the fund deposited in court; the remainder was to be delivered to Johnston. On appeal by Johnston, the Oregon Supreme Court affirmed the judgment, but directed that the decree also include judgment in favor of Johnston and against Marshal.

While it is true therefore that at the time the tractor was seized by appellee Borthick and Curran pursuant to the warrant of distraint, appellant was the owner thereof, that fact is immateiral in so far as the validity of the seizure thereof is concerned for he was "owner" subject to the federal lien. He was not a "purchaser" thereof within the meaning of Section 3672(a)(1) at the time of the recordation of the Government's lien. *United States v. Scovil,* 348 U.S. 218, 221; *United States v. Kings County Iron Works,* 224 F. 2d 232, 237 (C.A. 2d). And see *MacKenzie v. United States,* 109 F. 2d 540 (C.A. 9th), and *United States v. Phillips,* 198 F. 2d 634 (C.A. 5th).

As previously pointed out, the Government's lien for taxes is valid as against a subsequent purchaser, such as appellant herein, once the notice of lien is filed in the office in which the filing of such notice is authorized by the law of the state in which "the property subject to the lien is situated," i.e., the county in which the taxpayer resides. Furthermore, it is clear that prior to the time he purchased the tractor from taxpayer Marshal, subject to a chattel mortgage in Stotts, appellant was aware of the fact that taxpayer was delinquent in the payment of his federal income tax. It was so held, on the basis of appellant's own testimony in *Stotts v. Johnston and Marshall, supra,* wherein the Supreme Court of Oregon quoted Johnston (p. 1061) as testifying that "He (Marshal) told me he owed money to the Internal Revenue and to the State, and, gosh, I wouldn't remember who all." It also appears from that case (pp. 1064-1065, 1066) that Johnston conceded the validity of

taxpayer Marshal's unpaid tax, together with the validity of the Government's lien and the seizure. Since the Government's lien attaches to after-acquired property of a tax delinquent taxpayer (*Glass City Bank v. United States,* 326 U.S. 265), the lien involved herein attached to the caterpillar tractor when taxpayer acquired ownership thereof (October 26, 1945) and persisted until the liability was satisfied (Section 3671 of the Code).[8]

B. The appellees acted under a valid warrant for distraint

Although appellant asserts (Br. 9) that there was no proof of a valid warrant for distraint having been issued, the stipulated facts (R. 18-19) establish the contrary. Appellant obviously misconceives the nature of a warrant for distraint of federal taxes, for he charges (Br. 14-15) that the "warrant" (referring presumably to Defendant's Exhibit 11) was invalid because (1) it did not in any way describe the property to be seized, (2) it was not issued by the Collector then in office, but by a "former collector," and (3) it "was not regular on its face because it had not been returned within the time limited from its issue date." We are cited to no legal authority as support for these statements, and we know of none. We shall demonstrate, however, that they are erroneous and without merit.

The authority of a Collector or Deputy Collector of federal taxes to distrain and levy upon property of a tax

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[8]It appears that the liability for the taxes assessed herein was satisfied prior to sale by payment by the chattel-mortgagee Stotts on July 23, 1948, whereupon the tractor was released to Johnston. (R. 9, 25, 29-30.) And see *Stotts v. Johnston and Marshall, supra,* pp. 1060-1061.

delinquent taxpayer is defined and described in the following sections of the Internal Revenue Code of 1939 (Appendix A, *infra*): Section 3640 authorizes and requires the Commissioner to assess all taxes and penalties imposed under the Code; Section 3641 provides that the Commissioner shall certify a list of such assessments when made to the proper collectors "who shall proceed to collect and account for the taxes and penalties so certified"; Section 3651(a)(1) provides that "It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated"; Section 3654 treats of the general powers and duties relating to collection, subsection (a) thereof requires that, within his district, every collector shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and subsection (b) states that every Deputy Collector shall have the like authority to collect taxes levied or assessed; Section 3655(a) provides that, where it is not otherwise provided, the Collector, either in person or by deputy, shall, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein. If such person neglects or refuses to pay the taxes within ten days after notice and demand, the Collector or his deptuy is authorized under Section 3690 (Appendix A, *infra*) to collect such taxes, with interest and other additional amounts as required by law, by distraint and sale of the goods, chattels or effects of the taxpayer. In case of such neglect or refusal to pay, the

Collector, pursuant to the provisions of Section 3692 (Appendix A, *infra*), "may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property," except such as are exempt, belonging to the tax delinquent taxpayer "or on which the lien provided in section 3670 exists" for the payment of the sum due, including interest, penalty, and costs. It is also required, by the provisions of Section 3710 (Appendix A, *infra*), that any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the Collector or Deputy Collector making the levy, surrender such property or rights to property to such Collector or Deputy.

It is clear from the foregoing provisions that the authority of a Collector to distrain and levy, or his warrant for distraint, is the receipt of the assessment list from the Commissioner. That this is so was made plain by the Supreme Court at an early date in the case of *Erskine v. Hohnbach,* 14 Wall. 613, which involved an action in trespass against a Collector for the alleged seizure and conversion to his own use of certain personal property of the plaintiff. In its opinion, the Supreme Court stated (p. 616) that "The assessment, duly certified to him [the Collector], was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection." That principle was reasserted in *Haffin v. Mason,* 15 Wall. 671, 675, involving an action to recover from a Collector the value of property seized and sold for payment of certain ex-

cise taxes, wherein it was stated (p. 675) that the assessment list properly certified to the Collector "was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them." See also, *Harding v. Woodcock,* 137 U.S. 43; *Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 381; *Powell v. Rothensies,* 183 F. 2d 774 (C.A. 3d).

In the instant case, it is stipulated (R. 18) and the District Court found (R. 39) that the taxes, to satisfy which the caterpillar tractor was seized, were assessed by the Commissioner, and that the assessment list was received by the Collector then in office. No question is raised as to either the form or sufficiency of the assessment or the assessment list, and the receipt of the latter by the Collector constituted his authority or warrant to distrain.

The "warrant for distraint" (R. 19, 34, 40; Deft. Ex. 11) issued by the Collector (Maloney) on October 17, 1945, and directed successively to various deputy collectors, was merely evidence of the Collector's authority to distrain and levy and the "warrant" (Code Section 3692) of the deputy collectors to act for him. While it is true, as appellant asserts (Br. 14), that such warrant did not describe the property in question, such a description is not required by any provision of federal law. The law itself (Section 3690) gives a Collector or Deputy Collector the authority to distrain and sell the goods, chattels, or effects of a taxpayer, and (Section 3692) to levy upon his property and rights to property or on which the lien provided in Section 3670 exists. The warrant referred to was framed in the language of Section

3692 and was directed against the taxpayer, and as demonstrated above, a valid lien did exist on the caterpillar tractor. *Metropolitan Life Ins. Co. v. United States,* 107 F. 2d 311 (C.A. 6th), certiorari denied, 310 U.S. 630.

Whether or not the warrant issued on October 17, 1945, was issued by a "former collector," rather than the one in office at the time the seizure was made is immaterial. The assessment of September 7, 1945, remained unsatisfied and it was the right and duty of any succeeding Collector to enforce their collection (Sections 3651(a)(1) and 3654) pursuant to the certification of September 19, 1945. The validity of the appellee Collector's action is also evidenced by Code Section 3950(a)(1) (Appendix A, *infra*) which provides that every Collector shall be charged with the whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other Collectors, or delivered to him by his predecessor in office.

Appellant's third assertion (Br. 15, 18) that the warrant had not been returned within the "required * * * 90 days" and hence was not "regular on its face" is equally without merit. In the first place, the direction in that warrant (Deft. Ex. 11) to the Deputy Collectors to "make due return to me at this office on or before the sixtieth day after the execution hereof" was merely for administrative purposes, and nothing therein stated that the warrant was to expire and be null and void at the end of that time. Secondly, the authority (Section 3692) of the appellee Collector and Deputy Collectors to levy upon the property or rights to property of tax-

payer "on which the lien provided in section 3670" existed persisted as long as the lien continued, namely (Section 3671), until the liability covered by the assessment list was satisfied or became unenforceable by reason of lapse of time.

C. The appellees acted within the scope of their authority and are not liable in damages

As pointed out above, no question is raised as to the validity of the assessment involved, nor to the form or sufficiency of the assessment list certified to the Collector then in office. It is also clear that a valid lien attached to taxpayer Marshal's property in the caterpillar tractor prior to the time appellant Johnston became a purchaser thereof. Under the circumstances, the Collector and Deputy Collectors were under a ministerial duty to collect the tax, and they cannot be held answerable in damages for so doing. *Erskine v. Hohnbach, supra; Haffin v. Mason, supra; Harding v. Woodcock, supra; Moore Ice Cream Co. v. Rose, supra; Powell v. Rothensies, supra.* In the *Haffin* case, the Supreme Court, in discussing a question of liability such as involved herein stated (p. 675):

> A ministerial officer, in a case in which it is his duty to act, cannot on any principle of law be made a trespasser. This court, in the recent case of *Erskine v. Hohnbach,* applying this doctrine to a collector of internal revenue, say, that his duties in the enforcement of a tax-list are purely ministerial, and that "the assessment duly certified to him is his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constitutes his protection."

> The assessment in this case, duly certified by Hyatt, the assessor, was received in evidence without objection, and no point was raised as to its form or sufficiency. If, then, the assessor had the right to decide the question, whether the plaintiffs were liable to the increased taxation, the list delivered by him to the collector, properly certified, was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them.
>
> It was not the business of the collector to inquire into the case to ascertain whether the assessor had reached a proper conclusion upon the matter submitted to his judgment, nor had he any right to refuse to enforce the assessment.

Similarly, in the *Harding* case which involved an action against a Collector for an alleged wrongful seizure and sale of the property of a plaintiff upon an assessment which was subsequently adjudged to have been invalid, the Supreme Court again reasserted the doctrine of the *Erskine* and *Haffin* cases and held that a liability could not be fastened upon a Collector, a ministerial officer, for the enforcement of an assessment of taxes regular on its face, made by the Commissioner. Of such an officer, the Court said (137 U.S., 48) "the law exacts unhesitating obedience to its process."

Moore Ice Cream Co. v. Rose, supra, involved a suit by a corporation against a Collector to recover income and excess profits taxes alleged to have been wrongfully collected under threat of distraint and sale of the corporation's property. In holding that there was no liability, the Supreme Court pointed out (p. 381) that the Collector acted under directions of the Secretary of the Treasury, or other officers of the Government, in the

collection of the tax; that the complaint showed upon its face that the tax had been duly assessed by the Commissioner; that the Collector was therefore under a ministerial duty to proceed to collect the tax; that there was nothing left to his discretion; and that, since his duty was "imperative," he was protected by the command of his superior from liability for trespass. Although it also added that the Collector was entitled as of right to a certificate converting the suit against him into one against the Government,[9] it observed (p. 382) that the particular case was not one for a certificate of probable cause "as it might be if the officer had trespassed under a mistaken sense of duty."[10] In such circumstances, the Court said, a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. It added (p. 382) "One does not speak of probable cause when justification is complete." This latter comment is equally applicable in the circumstances of the instant case, for, as already demon-

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[9]Citing *United States v. Sherman,* 98 U. S. 565. See also *Mellon v. United States,* 36 F. 2d 609 (C.A. D.C.); *United States v. Kales,* 314 U. S. 186.

[10]It should be pointed out, however, that no certificate of probable cause could in any event be issued here. The action is in tort based upon an act of an employee of the Government and is a tort claim arising in respect of the assessment of a tax, both of which are specifically excepted from 28 U.S.C., Section 1346 (b), by the provisions of 28 U.S.C., Section 2680 (a) and (c). Cf. *Dalehite v. United States,* 346 U.S. 15; and see *United States v. Worley,* 213 F. 2d 509, 512 (C.A. 6th), certiorari denied, 348 U.S. 917; and Judge Fee's order of December 12, 1952, in the former case of *Johnston v. United States* (Civil No. 4978, Ore.), dismissing for lack of jurisdiction a suit brought by appellant herein against the United States as being within the exception of 28 U.S.C., Section 2680 (c).

strated, the fact is that the seizure of the tractor was completely justified, and whether or not the Collector or Deputy Collectors had any "belief" or "information" that a lien existed (Br. 4, 9, 20-26) is of no consequence. Admittedly, they all acted in their official capacities and pursuant to the lawful authority of their superior officers. (R. 18-19, 39-40.) Moreover, since a valid lien existed in favor of the Government, this is not a case, as appellant mistakenly conceives it (Br. 10-11, 15-16, 19), of seizing the property of one person to satisfy the taxes of another. Cf. *Stuart v. Chinese Chamber of Commerce of Phoenix,* 168 F. 2d 709 (C.A. 9th), in which circumstance this Court has held that a civil action would lie to recover the amount collected—here $1,320.71.

Finally, the case of *Powell v. Rothensies, supra,*[11] also stands as authority for the position of the appellees herein and as support for the holding of the District Court that they acted "within the scope of their authority in taking the tractor from plaintiff's possession." (R. 42; Appendix B, *infra.*) That case also involved an action to recover damages from a former Collector for the alleged illegal seizure and sale by him of certain of the property of the plaintiff therein. In affirming the decision of the lower court (86 F. Supp. 701 (M.D. Pa.)), the Third Circuit pointed out that at the time of the levy and seizure there were outstanding in the hands of the defendant Collector two unpaid assessments against the

[11]See also *Herwig v. Crenshaw,* 188 F. 2d 572 (C.A. 4th), certiorari denied, 342 U.S. 905, and *Sidbury v. Gill,* 102 F. Supp. 483 (E.D. N.C.).

plaintiff of manufacturer's excise taxes and that the warrant for distraint under which the levy and seizure were made was expressly based upon those two outstanding unpaid assessments. Under such circumstances, the Court concluded (p. 775) that it was within the scope of the Collector's ministerial duty to make the levy and collection there in controversy "and he cannot be held answerable in damages for so doing."

In its opinion in the above-cited case, the lower court said (p. 702) that for acts to be considered "within the scope of official authority" they need not be prescribed by statute or even specifically directed or requested by a superior officer, but that it was sufficient if they were done by an officer "in relation to matters committed by law to his control or supervision," or were governed by a lawful requirement of the department under whose authority the officer acted.[12] That court also pointed out that the legal principle generally applied to a situation such as existed therein was that, as to many governmental officers, even the absence of probable cause and the presence of malice or other bad motive were not sufficient to impose liability upon such an officer who acted within the scope of his authority. Having reference then to the facts of this case and the applicable law, it is an *a fortiori* proposition that the Collector and Deputy Collectors acted "within the scope of their authority," that they did not convert property of the appellant to their own use, and that they are not liable to him in damages, indeed, the facts affirmatively show that appellant suffered no injury.

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[12]See also *Cooper v. O'Connor,* 99 F. 2d 135 (C.A. D.C.).

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectively submitted,
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JULY 1956

APPENDIX A

Internal Revenue Code of 1939:

SEC. 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law.
(26 U.S.C. 1952 ed., Sec. 3640.)

SEC. 3641. CERTIFICATION OF ASSESSMENT LISTS TO COLLECTORS.

The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified.
(26 U.S.C. 1952 ed., Sec. 3641.)

SEC. 3651. COLLECTION AUTHORITY.

(a) *In General.*—

(1) *Within district.*—It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3651.)

SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.

(a) *Collectors.*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books,

papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the manner as provided in section 3615.

(b) *Deputy Collectors.*—Every deputy collector shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such.

(c) *Internal Revenue Agents.*—Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.
(26 U.S.C. 1952 ed., Sec. 3654.)

SEC. 3655. NOTICE AND DEMAND FOR TAX.

(a) *Delivery.*—Where is it not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3655.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in

favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 152 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office with the State or Territory; or

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such in-

terest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.* — The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710.)

SEC. 3950. CHARGES AND CREDITS.

(a) *Charges.*—Every collector shall be charged with—

(1) *Taxes.* — The whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other collectors, or delivered to him by his predecessor in office, and the additions thereto:

* * * * *

(26 U.S.C. 1952 ed., Sec. 3950.)

1 Oregon Revised Statutes (1953):

UNIFORM FEDERAL TAX LIEN REGISTRATION ACT

87.805 *Federal tax lien registration; filing of notice of lien and certificate of discharge.* Notices of liens for taxes payable to the United States of America and certificates discharging such liens shall be filed in the offices of the recorder of conveyances, in counties which have a recorder of conveyances, and in other counties in the offices of the county clerks, for the county or counties in this state within which the property subject to such lien is situated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ART JOHNSTON, Plaintiff, vs. HUGH EARLE, Collector of Internal Revenue, JOHN DOE SHANKS, JOHN SMITH BORTHWICK and JAMES ROE KERN, Defendants.	Civil 7571 MEMORANDUM OF DECISION

The rule appears to be that a public official acting "within the scope of his authority" is immune from personal liability for mistake of fact. L. Hand in Gregoire v. Biddle, 177 F. 2d. 579.

"Scope of authority" does not mean that the officer must have acted rightly. I would judge from the oral argument plaintiff is under that misapprehension.

Pacific Telephone & Telegraph Co. v. White, 104 F. 2d. 923, appealed from this district (24 F. Supp. 871), was a beatup by the chief private police officer of the Telephone company on the suspected master-minder of a sensational daylight robbery. "Scope of authority" was discussed in that case.

In Nelson v. American-West African Line, 86 F. 2d. 730 Learned Hand held a ship owner liable for the violent acts of a drunken bosun.

In the case at bar, defendants were, in my opinion, acting within the scope of their authority, as the phrase is known to the law. I will make such a finding and the conclusion of immunity will necessarily follow from the finding.

No costs.

Dated May 10, 1955.

/s/ Claude McColloch
Judge

Endorsed:
Filed May 10, 1955
F. L. Buck, Acting Clerk
By R. DeMott, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ART JOHNSTON, Plaintiff,	)	
	)	
vs.	)	
	)	Civil No. 7571
HUGH EARLE, Collector of Internal Revenue; JOHN DOE SHANKS; JOHN SMITH BORTHWICK; and JAMES ROE KERN,	)	ADDITIONAL MEMORANDUM
Defendants.	)	

This is a case of many points and plaintiff urges me on re-argument to pass on other points.

This raises a question of method, a question often pressed on judges. A newcomer to the Federal appellate bench ventured some years ago that a trial judge should in most cases deny motions for directed verdicts, so the appellate courts could pass on the cases. One of the many things the judge who ventured the dictum over-

looked, was that only a small percentage of cases are appealed.

Plaintiff assumed on re-argument that the tractor was not in Lane County between October 20, 1945, and May 29, 1946, the key dates. I doubt very much if that is correct, despite the fact that Judge Fee so held in the earlier Tort Claims case. That case was obviously badly tried, so much so, that both parties joined in representing to the court the tractor had been seized in Columbia County, whereas, in fact, the seizure was in Clackamas County.

I feel impelled to adhere to my former opinion. If it be thought that "scope of authority" is a conclusion of law rather than a fact, I now add to the conclusions of law that defendants were acting within the scope of their authority.

Plaintiff's judicial admissions in the state court case must weigh heavily against him on the issue of validity of the seizure. Compare Lane v. Fitzsimmons Stores, 62 F. Supp. 89, including notes.

Dated June 17, 1955.

/s/ Claude McColloch
Judge

I had not thought it necessary to point out that on no possible theory is former Collector Earle liable.

I may add the "mistake of fact" I had in mind was that the tractor was in Lane County between the key dates.

/s/ C.MCC

Endorsed:
Filed June 17, 1955
F. L. Buck, Acting Clerk
By H. S. Kenyon, Deputy.

CITATIONS

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Cases